Supreme Court, U.S.
FILED

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In The
Supreme Court of The United States
October Term 1998

HARCROS CHEMICALS, INC.,
Conditional Cross-Petitioner,
v.

CITY OF TUSCALOOSA, et al.,
Respondents.

Petition For A Writ Of Certiorari To The United States Court of Appeals For The Eleventh Circuit

CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

DAVID E. EVERSON*
MICHAEL W. ATCHISON
Stinson, Mag & Fizzell, P.C.
1201 Walnut, Suite 2800
Kansas City, MO 64106
(816) 842-8600

STANLEY A. CASH
Huie, Fernambucq & Stewart
First Alabama Building
Birmingham, AL 35203
(205) 251-1193

****Counsel of Record***
Attorneys for Conditional Cross-Petitioner

APPELLATE ADVANTAGE
POST OFFICE BOX 7506◆KANSAS CITY, MO 64116◆816-453-2424

10 pp

QUESTION PRESENTED

Can inference of a Sherman Act conspiracy in a circumstantial parallel pricing case be drawn without evidence tending to show that the defendant's conduct would be against its own economic self-interest and without evidence tending to show that the defendant had a reasonable motive to participate in the alleged conspiracy?

PARTIES TO THE PROCEEDINGS

Auburn Water Works Board, Plaintiff

Baker Hill Water Authority, Plaintiff

The Board of Water and Sewer Commissioners of the City of Mobile, Plaintiff

The Board of Water & Sewer Commissioners of the City of Saraland, Plaintiff

Calhoun County Water and Fire Protection Authority, Plaintiff

Central Elmore Water Authority, Plaintiff

The City of Alexander City, Plaintiff

The City of Dothan, a municipal corporation, Plaintiff

City of Fairhope, Plaintiff

The City of Huntsville Water Works Utility Board, Plaintiff

City of Phenix City, Plaintiff

City of Sheffield, Plaintiff

City of Tuscaloosa, Plaintiff

City of Vernon Water and Sewer Board, Plaintiff

Dallas County Water and Sewer Authority, Plaintiff

Geneva Water Works and Sewer Board, Plaintiff

Harcros Chemicals, Inc., Defendant

Industrial Chemicals, Inc., Defendant

Jasper Water Works and Sewer Board, Inc., Plaintiff

Jefferson County, Alabama, Plaintiff

Jones Chemicals, Inc., Defendant

Municipal Utilities Board of Albertville, Plaintiff

North East Morgan County Water and Fire Protection Authority, Plaintiff

Opelika Water Works Board, Plaintiff

P.B. & S. Chemical Co., Inc., Defendant

Perdido Bay Water, Sewer and Fire Protection District, Plaintiff

Town of Hayneville, Plaintiff

Tri-Community Water System, Plaintiff

Utilities Board of the Town of Citronelle d/b/a South Alabama Utilities, Plaintiff

The Utilities Board of the City of Gulf Shores, Plaintiff

The Utilities Board of the City of Muscle Shoals, Plaintiff

Van Waters & Rogers, Inc., Defendant

The Water Works Board of the City of Arab, Plaintiff

The Water Works and Sewer Board of the City of Birmingham, Plaintiff

Water Works & Sewer Board of the City of Centre, Plaintiff

The Water Works and Sewer Board of the City of Gadsden, Plaintiff

The Water Works and Sewer Board of the City of Greenville, Plaintiff

The Water Works Board of the City of Leeds, Plaintiff

The Water Works and Sanitary Sewer Board for the City of Montgomery, Plaintiff

The Water Works and Sewer Board of the City of Prichard, Plaintiff

The Water Works, Sewer and Gas Board of the City of Scottsboro, Plaintiff

The Water Works and Sewer Board of the City of Selma, Plaintiff

The Water and Sewer Board of the City of Talladega, Plaintiff

Westover Water and Fire Protection Authority, Plaintiff

STATEMENT PURSUANT TO RULE 29.6

Conditional Cross-Petitioner Harcros Chemicals, Inc., is wholly-owned by Elementis America, Inc., which in turn is wholly-owned by Elementis Nederland BV. No publicly held company owns 10% or more of the stock of Harcros Chemicals, Inc. Harcros Chemicals, Inc., has no nonwholly owned subsidiaries.

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STATUTES

15 U.S.C. § 1 viii
28 U.S.C. § 1254(1) viii

Conditional Cross-Petitioner Harcros Chemicals, Inc. ("Harcros"), respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in *City of Tuscaloosa v. Harcros Chemicals, Inc.*, No. 95-6234 (11th Cir. Oct. 23, 1998).

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported at 158 F.3d 548. The opinion of the United States District Court for the Northern District of Alabama is reported at 877 F. Supp. 1504. The district court's order is not reported. The opinions and order are included in the Appendix to the Petition for a Writ of Certiorari (No. 98-1807) filed with this Court by Petitioner Industrial Chemicals, Inc.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Eleventh Circuit entered its judgment on October 23, 1998. The Court of Appeals denied timely petitions for rehearing on February 8, 1999. (Apdx.). Harcros expressly relies on Supreme Court Rule 12.5 in filing its Conditional Cross-Petition for a Writ of Certiorari. Harcros's Conditional Cross-Petition follows the Petition for a Writ of Certiorari filed by Petitioner Industrial Chemicals, Inc., which was docketed on May 10, 1999 (No.

98-1807). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. § 1, provides in pertinent part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. . . .

STATEMENT OF THE CASE

Harcros concurs with and adopts the Statement of the Case contained in the Petition for a Writ of Certiorari filed by defendant Industrial Chemicals, Inc. (No. 98-1807), but adds the following.

Plaintiffs hired expert witnesses to prepare statistics and to draw inferences therefrom. Their statistician created a database from various bid documents. The database showed that Harcros was the dominant supplier in Alabama from 1983 to 1990 (the operative years of the alleged conspiracy), routinely defeating its competitors and winning more bids to supply chlorine in ton containers (58) than the other four defendants combined (43). Plaintiffs' experts also used the database to calculate incumbency rates on ton container sales, in many cases based on "sub-markets" consisting of five or fewer bids per year. Plaintiffs then claimed that the incumbency rates were abnormally high, despite the fact that they themselves often directly affected the rates by choosing to award business to incumbent suppliers despite equally low bids from competitors.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

In addition to the statements made by Industrial, Harcros adds the following reasons for granting the writ.

By discarding the business justification test and relying exclusively on plus factors identified on an *ad hoc* basis, the Eleventh Circuit has adopted a standard that conflicts with that of other circuits and this Court. *See Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 768, 104 S. Ct. 1464, 1473, 79 L.Ed.2d 775 (1984). At its best, an *ad hoc* determination is erratic and not necessarily considerate of rational economic motives. At its worst, it is inconsistent with the business justification test.

In *City of Tuscaloosa*, the Eleventh Circuit decided that an undefined "high" rate of incumbency was enough to override the district court's grant of summary judgment. That plus factor would create an odd standard of behavior for Harcros, one that is not in its own independent business interest.

Harcros was the most successful bidder in Alabama, winning approximately half the bids in most years. Harcros's business success led directly to a higher rate of incumbency which, in the eyes of the Eleventh Circuit, made it more likely

to be a conspirator. The decision of the Court and other Circuits would not allow this result. *See, e.g., Monsanto*, 465 U.S. 752; *Cayman Exploration Corp. v. United Gas Pipeline Co.*, 873 F.2d 1357 (10th Cir. 1989); *Pan-Islamic Trade Corp. v. Exxon Corp.*, 632 F.2d 539 (5th Cir. 1980), *cert. denied*, 454 U.S. 927 (1981); *Venzie Corp. v. United States Mineral Products Co.*, 521 F.2d 1309 (3d Cir. 1975).

The mischief of the Eleventh Circuit's decision in *City of Tuscaloosa* is that it will undermine existing standards for summary judgment. In a line of cases from *First Nat. Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 88 S. Ct. 1575, 20 L.Ed.2d 569 (1968), to *Monsanto* and *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S. Ct. 1348, 89 L.Ed.2d 538 (1986), this Court has encouraged, even required, summary judgment for defendants whose actions have been consistent with their own independent business interests. The Eleventh Circuit has now replaced that standard with an erratic one whose application will give guidance neither to district courts nor businesses. That approach is in error. Harcros is entitled to summary judgment.

CONCLUSION

Based on the confusion among the circuits, Harcros petitions the Court to grant certiorari and provide direction as to what circumstantial evidence is required to support an inference of antitrust conspiracy in a case based on conscious parallelism.

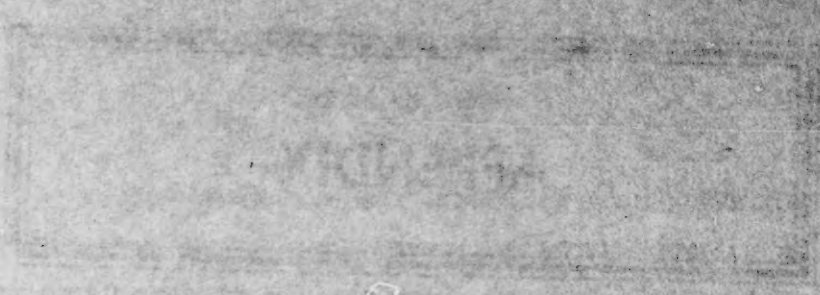
Respectfully submitted,

David E. Everson
Counsel of Record
Michael W. Atchison
Stinson, Mag & Fizzell, P.C.
Attorneys for Conditional Cross-Petitioner
1201 Walnut
Suite 2800
Kansas City, Missouri 64106
(816) 842-8600

Stanley A. Cash
Huie, Fernambucq & Stewart
First Alabama Building, Suite 800
Birmingham, Alabama 35203
(205) 251-1193

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT



IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 95-6234

CITY OF TUSCALOOSA;
MUNICIPAL UTILITIES BOARD
OF ALBERTVILLE, et al.,
Plaintiff-Appellants,

AUBURN WATER WORKS BOARD;
JASPER WATER WORKS AND SEWER
BOARD, INC., et al.,
Plaintiffs-Intervenors-Appellants,

versus

HARCROS CHEMICALS, INC.;
JONES CHEMICALS, INC., et al.,
Defendants-Appellees

On Appeal from the United States District Court for the
Northern District of Alabama

ON PETITION FOR REHEARING AND
SUGGESTION(S) OF REHEARING EN BANC

(Opinion _____, 11th Cir., 19__, ____F.2d____).

Before: TJOFLAT and COX, Circuit Judges, and WELLFORD*. Senior Circuit Judge.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT

/S/
UNITED STATES CIRCUIT JUDGE

*Honorable Harry W. Wellford, Senior U.S. Circuit Judge for the Sixth Circuit, sitting by designation.

FILED, U.S. COURT OF APPEALS, ELEVENTH CIRCUIT
FEBRUARY 8, 1999, THOMAS K. KAHN, CLERK.